

4-1-2004

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### Recommended Citation

Andrew A. Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 Buff. Envtl. L.J. 101 (2004).

Available at: <https://digitalcommons.law.buffalo.edu/belj/vol11/iss2/1>

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# BEYOND ZONING: DYNAMIC LAND USE PLANNING IN THE AGE OF SPRAWL

Andrew Auchincloss Lundgren\*

We cannot and should not expect a system invented and constructed to resolve social and “environmental” problems of the early twentieth century to serve us equally well as we enter the next millennium.

*-Lee R. Epstein*

## I. INTRODUCTION

### *A. The Dilemma*

The American cities of the twenty-first century would scarcely be recognizable to the urban denizen of 1900. Long gone are the days of debilitating and violent clashes between labor and management and blocks of tenement houses marked by squalor, devastating poverty, and a lack of basic necessities, such as clean food, water, and adequate light. Also gone are the cities characterized not by vibrant communities, but by filthy streets and air choked by industry’s incessant drumbeat, and the total absence of health and safety regulations for the masses—adults and children alike—employed at the nation’s urban factories and manufacturing

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houses. Although vestiges of these social ills remain throughout all parts of the country today, these byproducts of the Industrial Revolution, perhaps unforeseen in the age of Carnegie and Rockefeller, were approaching crisis proportions in the first decades of the twentieth century. As the cities, particularly on the east coast and in the Midwest, grew in population, square acreage, and economic prowess, these social problems—escalating labor unrest, inadequate and dangerous housing conditions, unabated pollution of air and water, and a government which turned a blind eye to its citizens' basic welfare—threatened to undermine not only the local urban economies, but each city's continued social viability as well.<sup>1</sup>

In response, lawmakers, economists, engineers, and architects began to reconceptualize the city and its structure by identifying the above maladies as public enemy number one for the coming century. As a result, the profession of urban planning was born; henceforth, the urban landscape would be shaped and fashioned on the bedrock of social science.<sup>2</sup> Simultaneously, it would be coaxed by the unseen hand of the market, and constrained by the iron fist of law. Nearly a century later, much of the urban distress facing late-Victorian America has been alleviated, largely through the efforts of these early planners.

Today, however, the nation's cities face a new dilemma: urban decay. Increasingly, the American city has fallen prey to

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<sup>1</sup> See generally EDWARD EWING PRATT, *INDUSTRIAL CAUSES OF CONGESTION OF POPULATION IN NEW YORK CITY* (1911).

<sup>2</sup> By the 1920s, three strands of urban regionalism had emerged. The first, led by Lewis Mumford and the Regional Planning Association, emphasized a "holistic mix of physical, social, and economic development." Stephen M. Wheeler, *Regional Planning: A Call to Re-Evaluate the Field*, 14 *BERKELEY PLANNING J.* 1, 2 (2000). The second group, whose main ideas culminated in the New York Regional Plan, sought to quantify urban planning through statistical compilations of housing, traffic, infrastructure, and demographics data. See *id.* Finally, Howard Odum and others tackled industrial growth from the perspective of the cultural region. See *id.*

population depletion, increased *de facto* economic and racial segregation, and inefficient modes of transportation. Whereas a century ago many fingered the burgeoning divide between rich and poor in the city, today many urban domains are characterized only by the impoverished. Moreover, while a century ago many complained of the ubiquitous smokestack and its asphyxiating effects, today we are suffocated by the air pollution caused by thousands of tiny smokestacks, crowded on our mega-highways and vast parking lots. While much progress has undoubtedly been made in remedying the social, economic, and environmental iniquities which marked the early twentieth-century urban center, many of these ills remain. The dilemmas that the American city faced one hundred years ago, however, linger not in the urban core itself, but rather in the geographical periphery which the cities themselves swallowed up. While these suburban and exurban areas represent a new *situs* of development—undisturbed and inexpensive land and resources—they have not escaped the same problems which plagued their built-environment predecessors.

### *B. Resolution*

This work aims to explore the evolution of land use law in the American city, from its humble eighteenth- and nineteenth-century beginnings, through its meteoric rise in the early twentieth, and, arguably, its equally monumental fall from grace in the past several decades. Specifically, the author intends to focus on suburban and exurban development patterns (or lack thereof) and the threat of low-density, urban sprawl to the social, economic, and environmental resources of both the core city and its surrounding land. This work will argue that the urban problems of a century ago—social and economic inequity, congestion, and pollution—have never really been solved; rather, they recur in a different, greatly expanded form at the suburban level. As a result, a new call to action is suggested, one which diverges from the orthodoxy of twentieth-century urban planning. The author proposes a different framework for analyzing these contemporary problems in

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urban land use, one that, not unlike the landmark case of *Vill. of Euclid v. Ambler Realty Co.*,<sup>3</sup> aims to reconceptualize the fundamental aspects of land use and governmental power. Specifically, the work will discuss the merits of planning on a regional, rather than a municipal (Euclidian), scale. To this end, the work argues that the Standard State Zoning Enabling Act (SSZEA),<sup>4</sup> and its state legislative counterparts, be altered to more readily encompass regional planning. These amendments, to be effective, must reside power in a regional body, such as the respective state or county government, which is capable of addressing the problems which have spilled out of the cities—and onto the surrounding landscape—from a unified perspective. This proposal, while advocating a monumental and undoubtedly controversial shift in delegated governmental power, need not cast aside traditional zoning and other municipality-based concepts. Rather, regional planning can form a much needed counterpart to the prerogatives of local land use controls, balancing out the shortsighted initiatives municipalities undertake, frequently unintentionally, in the name of public welfare.

This reconceptualization should not limit itself to the excesses of the past—history not only tells us where we have been, but also where we should be headed. Responsible land use policy requires that the legal and planning professions recognize the dynamism of society and its ever-shifting relational arrangements and abilities. Instead of a twenty-first century land use ethic, the policies which replace and build upon past development patterns and constraints must aim toward a loftier goal: a system of controls

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<sup>3</sup> 272 U.S. 365, 386-87 (1926) (“Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.”).

<sup>4</sup> Originally promulgated by the United States Department of Commerce, the Act can currently be found in AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE 210 (Tentative Draft No. 1, 1968) [hereinafter SSZEA]. See also DANIEL R. MANDELKER & JOHN M. PAYNE, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 200-04 (5<sup>th</sup> ed. 2001).

which acknowledges and heartily endorses the vagaries and uncertainties of the populace it shadows. In short, the “new” land use must be a dynamic, malleable regulatory scheme, of which its effectiveness is not characterized in spans of centuries.

This work will examine ways in which this sense of dynamism can be incorporated into a practical, efficient medium of controls. In particular, the author will explore considerations at an increasingly macrocosmic scales: beginning with the personal and local level, through the county and state government, and finally to the interstate level of the federal government. The local municipality has played a central role throughout this nation’s history, a role that is often applicable to the exclusion of all other concurrent rings of sovereignty. After detailing this orthodoxy, the work will argue that more attention is required at these larger levels in implementing effective and responsible patterns of growth. Much of the planning profession literature acknowledges this need<sup>5</sup>—this work will attempt to put forth a legal framework allowing these ideas to come to fruition.

The main vehicle for advocating this shift in planning philosophy is the comprehensive plan policy-element adopted by one of the more broadminded counties on the east coast, Chester County, Pennsylvania. In its *Landscapes: Managing Change in Chester County 1996-2020*,<sup>6</sup> the Board of County Commissioners has adopted a detailed, prospective, and realistic land use plan for the coming decades, one which accommodates future population and economic growth while simultaneously preserving open space and the area’s natural resources. As we will see, however, the plan is mostly hortatory; Pennsylvania law, like that of the other states’,

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<sup>5</sup> See, e.g., JOHN KROMER, *NEIGHBORHOOD RECOVERY: REINVESTMENT POLICY FOR THE NEW HOMETOWN* (1999); PHILIP LANGDON, *A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB* (1994); JAMES HOWARD KUNTSLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* (1993); PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1993).

<sup>6</sup> BOARD OF COUNTY COMMISSIONERS, COUNTY OF CHESTER, *LANDSCAPES: MANAGING CHANGE IN CHESTER COUNTY—1996-2020 COMPREHENSIVE PLAN POLICY ELEMENT* (1996) [hereinafter *LANDSCAPES*].

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rests the power to zone and plan with only the local municipality.<sup>7</sup> Although Chester County retains some oversight in land use planning, especially in the disbursement of funds to the local level, its vision cannot be fully implemented without changes to state law. Like the need for zoning before it, the next step in land development controls requires another coordinated effort between lawyers, planners, and others to allow for the continued viability of not only the urban center, but also the lands around it. Lands which, over the years, have come to play as an important a role in urban planning as the center it surrounds.

Part II explores the earliest governmental attempts at controlling the pace of development and the use of land. We will see that the first several hundred years of settlement in America brought an increase in prosperity and simultaneous conflict to its citizens, both of which were controlled by legislative action and judicial constraint through the Common Law. Part III moves to a heavily-industrialized and increasingly fractured United States, and the constitutional steps taken to mitigate capitalism's (literally) noxious byproducts. Specifically, Part III will examine the landmark *Euclid* case and its regulatory offspring, as well as the rise of suburbia—and its own wanted and unwanted progenies—in the post-World War II period.

Part IV will then address these derivatives of the shifting geography of the American populace. In particular, this Part will focus on the responses by the planning profession and its proposals for change, and the crucial role that the county, state, and federal governments must play in incorporating these ideas into law—while still adhering to constitutional principles. Chester County's

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<sup>7</sup> Under Pennsylvania law, "[c]ounty planning commissions shall publish advisory guidelines to promote general consistency with the adopted county comprehensive plan. These guidelines shall promote uniformity with respect to local planning and zoning terminology and common types of municipal land use regulations." 53 PA. STAT. CONS. STAT. ANN § 10301.4 (b) (2003) (emphasis added). Cf. *County of Venango v. Borough of Sugarcreek, Zoning Hearing Bd.*, 626 A.2d 489 (1993) (holding that action taken by county under enabling legislation may not conflict with zoning ordinance).

*Landscapes* will also be analyzed in the context of these new governmental functions. Finally, this work concludes in Part V with a discussion of specific proposals for change at all levels of government, who ultimately must operate in concert so as to effect meaningful and continuing change to our own local, regional, and national landscapes.

## II. THE ORIGINS OF LAND USE CONTROLS

From the time the English ship *Arbella* arrived at the inner-harbor of what is now Boston in 1630, the early European settlers of North America were treated to boundless riches. Although many early colonists were frustrated in their vain search for new sources of monetary wealth coveted in the Old World, John Winthrop,<sup>8</sup> Sir William Berkeley,<sup>9</sup> William Penn,<sup>10</sup> and the other migratory pioneers were sitting upon another treasure: unlimited amounts of land. This fortuitous byproduct of the grueling journey west across the Atlantic held the key to the future prosperity of America.

Almost from the beginning, the colonists trumpeted private land ownership. The dream of private property—and the attendant political, economic, and social benefits holding title entailed<sup>11</sup>—

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<sup>8</sup> Winthrop, a Suffolk lawyer who would later become the first governor of Massachusetts and other religious dissidents led a fleet of seventeen ships, including the *Arbella*, past the Isle of Wight on April 8, 1630, en route to the New World. JOHN WINTHROP, I WINTHROP'S JOURNAL: HISTORY OF NEW ENGLAND 1630-1649 23 (James K. Hosmer, ed., 1908).

<sup>9</sup> Berkeley, an Oxford-educated nobleman, sailed to Virginia in 1641 carrying the King's commission appointing him Royal Governor of that colony. See DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 207-08 (1989).

<sup>10</sup> Although not the first to participate in the Friends' Migration, Penn is the most famous Quaker of his time, and would go on to found the state that bears his name. See *id.* at 420-21.

<sup>11</sup> In some regions, there were religious benefits as well. Seventeenth-century Dedham, Massachusetts, for example, divided its lands according to "rank, quality, deserts and usefulness either in the church or commonwealth." *Id.* at 166-67. Such distributions helped maintain the social distinctions which



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was a realistic and attainable goal in the New World. In stark contrast to the European forebears who remained, the early settlers (and their descendants) could for the most part share in the wealth of the virgin land. For example, the towns of New England often apportioned land according to rank: four hundred to every "high rank man," three hundred to those of the "middle rank," and a measly two hundred to each "lower rank" individual.<sup>12</sup> In Virginia, the system of land grants was also adopted, but on a less egalitarian scale. Each land "patent" in the southern colony tended to encompass much larger tracts; in one case, two million acres were granted as a reward for royal loyalty.<sup>13</sup> As late as the mid-1700s, a young George Washington was maneuvering for land grants to further his speculative ambitions.<sup>14</sup> That the royal colonial governments could so willingly give away vast tracts of land is a testament to both the abundance of available, undisturbed land and its profitability—for both owner and the state—in the hands of private citizens who could put it to productive use.

As the colonies grew in population, however, so did the complexity of governing them. Although land remained abundant, natural and manmade resources were scarce, requiring a moderate degree of settled density. Accordingly, the colonial governments became increasingly involved in the affairs of its citizens, and their diverse uses of the land.<sup>15</sup> The era of regulation had begun.

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befitted a "Bible Commonwealth." *Id.* See generally WILLIAM HALLER, JR., *THE PURITAN FRONTIER; TOWN-PLANTING IN NEW ENGLAND COLONIAL DEVELOPMENT 1630-60* (1951).

<sup>12</sup> FISCHER, *supra* note 9, at 166-67.

<sup>13</sup> The entire area, bounded by the Rappahannock and Potomac rivers, was three times larger than the colony of Rhode Island, and was held by a single individual. *Id.* at 377.

<sup>14</sup> See ROBERT F. DALZELL, JR. & LEE BALDWIN DALZELL, *GEORGE WASHINGTON'S MOUNT VERNON* 34 (1998) (discussing land speculation in the nascent Ohio Company).

<sup>15</sup> England, of course, had already developed some modicum of regulation regarding the use and enjoyment of land. See, e.g., *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1128 (Q.B. 1707) (holding that action lies where defendant, "intending to damnify the plaintiff in his vivary," repeatedly discharged firearm over plaintiff's pond, scaring off waterfowl used in business). The court in

This Part will trace the evolution of early American land use, from its colonial origins through the Industrial Revolution. Specifically, the author will examine the inherited common-law mechanisms of nuisance, trespass, and covenant, and their efficacy in controlling the use of land in an age pre-dating heavy industry, mass transportation, and rapid communications. This Part will also examine how these legal concepts provided the building blocks for Euclidian zoning in the twentieth century.

*A. The Earliest Controls: Legislative Decree*

To the modern American lawyer, the rights inherent in private property are fundamental to an ordered regime of liberty. The firm, if not rigid, nuances of this “bundle” of rights, although not absolute, nevertheless occupy a fundamental plane of Anglo-American jurisprudence. In contrast, a more controversial aspect, hovering along its periphery and perhaps tangential to its nature, is the interplay between the rights of landowners in their property *per se*, and the interests of the larger citizenry in which it is situated. But long before the Fifth Amendment established the principles of just compensation and due process, and its consequent private-public distinction,<sup>16</sup> a decided and robust form of government regulation had already emerged. Without constitutional restraints, the various legislative bodies across the country were free to control the use of land as they saw fit, subject only to the common-law principles inherent in private ownership.

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Keeble cites precedent from the fifteenth century. *Id.* See also Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221 (1995) (discussing the “modernization” of common-law property principles in aftermath of English Revolution).

<sup>16</sup> The Fifth Amendment provides in part that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” U.S. CONST. Amend. V (emphasis added). For a discussion of the utilitarian justifications underpinning the compensation requirement, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HAR. L. REV. 1165 (1967).

Given this freedom, the legislative decree became the natural mode of regulation in the pre-Constitution era, and formed the basis for the earliest American land use controls. In issuing their decrees, the respective legislatures had clear policy objectives in mind: through the public laws, the colonial governments were able to avoid negative externalities and encourage positive ones.<sup>17</sup> As to the former, laws were enacted to control aesthetics, uniformity, excessive density, and even vegetation.<sup>18</sup> Positive externalities were also forcefully encouraged; as one commentator has put it, landowners "did not even have a right to do nothing with their land."<sup>19</sup> The artificial constraint of law was seen as a necessary mechanism for promoting the public good, and as an effective weapon against the frustrating effects of the "cumulative decisions of unguided individual actors."<sup>20</sup>

Beyond encouraging positive externalities, however, early land use regulations did not follow a consistent, unifying theme. Moreover, this "shifting amalgam of goals" was far removed from the neat boundaries of the modern police power.<sup>21</sup> Instead of grounding legislation solely on the familiar, trifurcated pillar of health, safety, and welfare, the early enactments often intruded into private spheres in ways unknown to the modern observer. In the aesthetic realm, for example, Hartford, Connecticut issued a city-wide ban on the construction of

. . . any Barn, Wood-House, Carriage-House, Shed . . . or other Out Houses whatsoever, Shops and Store-Houses only excepted . . . within Three Rods of the front of any of the Public Streets or Highways.<sup>22</sup>

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<sup>17</sup> John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1282 (1996) [hereinafter HART 1].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1110.

Similarly, erecting any "sign, signboard, pole or other device" which would "project into the said streets, lanes, or alleys more than six inches" was prohibited in Pennsylvania.<sup>23</sup> Perhaps negating any public safety rationale, the same statute allowed porches, steps, and cellar doors to extend much further into the street.<sup>24</sup> Aesthetic regulation was instead more concerned with order and regularity.<sup>25</sup>

There were also regulatory schemes aimed at controlling other aspects of land beyond aesthetics, such as statutes aimed at promoting the cultivation of soil, riparian land, and industry. For example, an early New York law found it "necessary that each [landowner], for the preservation of the Lands which have been granted to him, keep them enclosed, in order that the people may preserve undamaged, and avail themselves of the labor they bestow thereon."<sup>26</sup> As a result, owners of wandering animals were liable for any damage caused to the enclosed grounds.<sup>27</sup> Industry and riparian land use were also on the minds of the early legislators. For instance, colonial drainage acts were common, some of which forced a landowner to eradicate any on-site wetlands when a sufficient number of propertied neighbors insisted on such a

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<sup>23</sup> *Id.* at 1114. See Act of 1769, reprinted in ORDINANCES OF THE CORPORATION OF THE CITY OF PHILADELPHIA 33 (John C. Lowber ed., Philadelphia, Moses Thomas 1812).

<sup>24</sup> HART II, *supra* note 21 at 114.

<sup>25</sup> For example, one Virginia ordinance mandated that the "possessor of any lot" in the town construct a dwelling of at least sixteen square feet, upon threat of forfeiture. *Id.* at 1115. See Act of Oct. 1785, ch. XCIV, reprinted in 12 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 209 (William Waller Hening, ed. Richmond Va., George Cochran 1823).

<sup>26</sup> HART II, *supra* note 21, at 1264. See Ordinance of Feb. 23, 1656, reprinted in LAWS AND ORDINANCES OF NEW NETHERLAND, 1638-1674, at 218 (E.B. O'Callaghan Trans., Albany, N.Y., Weed, Parsons and Company 1868).

<sup>27</sup> HART II, *supra* note 21, at 1264.

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project.<sup>28</sup> One state even passed a mill act which granted any  
would-be entrepreneur the right to condemn a ten-acre site for use  
as a grist-mill.<sup>29</sup>

Many aspects of these statutes—their language, subject-matter, and scope—can rightly be seen today as foreign to a modern legal regime based upon constitutional and federalist principles. Adding to their unfamiliarity is the non-adjudicative milieu in which they operated, an environment filled with uncertainty. The early settlers were undoubtedly interested in turning a profit for their labors, but in the wilderness of a strange new world, pecuniary and worldly gain could rest only upon a solid, predictable platform. This foundation was societal in scale; the individual would only profit if the local community itself survived. As a result, the early land use controls, although disparate and often inequitable, always strove for a utilitarian benefit.<sup>30</sup> Individual rights in land were certainly recognized, but with extinction always just around the corner, the legislators' hands were tied.

#### *B. Private Law: Common-Law Tort and Real Property Covenants*

Regulating the use of land was also controlled through the medium of private law. Increasingly, landowners turned to legal mechanisms in resolving disputes and protecting their interests, whether pecuniary or otherwise. Of primary importance was the relief available to landowners through the common-law tort system and the real property covenant, two ancient orders which constituted the glue that held together the private sphere of land use, and which still play a role today. In addition, the passage of

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<sup>28</sup> *Id.* at 1117.

<sup>29</sup> HART I, *supra* note 17, at 1267.

<sup>30</sup> "Property ownership was 'not an absolute right that exempted the individual owner from corporate oversight,' but rather 'a right of stewardship that the public entrusted to an individual, for both private and public benefit.'" *Id.* at 1281 (internal citations omitted).

the Fifth Amendment, and its accompanying constraints,<sup>31</sup> provided the catalyst for this private sphere to slowly dominate the field; the colonial legislative decree began to disappear, no doubt hastened by the unsavory prospect of paying compensation for each new regulation.<sup>32</sup>

A long-standing judicial device for controlling the use of land, prominent in the English law courts up through the nineteenth century, was the recognition of local custom as an exception to more general principles of the common law.<sup>33</sup> When faced with evidence of a continuing, historical use of land, judges would often rule against the actual holder of title in favor of the particular actor, thereby enforcing a type of land use estoppel. For example, local fisherman who had long placed their nets on another's strip of land abutting the ocean were granted the privilege to continue to do so, despite the protests of the landowner.<sup>34</sup> In doing so, the court did not bestow legal status upon this custom, but instead "found that the custom had legal status by virtue of its lineage."<sup>35</sup> Especially in the face of a growing market economy in the nineteenth century, the judicial notice of custom gave decision makers a measure of flexibility in

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<sup>31</sup> See *supra* note 16 (discussing Fifth Amendment).

<sup>32</sup> The Fifth Amendment changed the calculus in providing for the public good, even before the boundaries of the modern police power were concretized. Instead of simply mandating a regime beneficial to its inhabitants, the legislatures were restrained by a constitutional principle that "[p]rotected individuals from having to bear the burden of the public good by requiring compensation for takings when it would be more fair to spread the burden to the public at large." Maureen Straub Kordesh, *"I Will Build My House With Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 404 (1996).

<sup>33</sup> Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993).

<sup>34</sup> See *Mercer v. Denne*, 1904 2 Ch. 534 (Farwell, J.), *aff'd*, 1905 2 Ch. 538 (C.A.). See also, Loux, *supra* note 33, at 186-87.

<sup>35</sup> Loux, *supra* note 33, at 187.

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ensuring that the productivity and effectiveness of local land use  
was at its peak.<sup>36</sup>

Beyond the doctrine of local custom and its limited application in America, the mainstream of early land use controls was built into the tort system, which allowed landowners to recover for injuries sustained to their holdings. Ownership of private property has never been accepted as absolute, notwithstanding the contentions by some early commentators<sup>37</sup> and any popular "intuitions" about just what property really is.<sup>38</sup> Instead, the true nature of property may be unique to the individual, an expression of personal and political identity, wholly divorced from the land or object itself.<sup>39</sup> Whatever that identity

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<sup>36</sup> "As nineteenth-century judges struggled to impose reason on an archaic system of landholding, and ancient customs of traditional communities were stretched to their limits by the exigencies of a growing market economy, the common law upheld customs that inured to the benefit of the many over the few and affirmed the effectiveness of law from below in regulating community resources." *Id.* at 218.

<sup>37</sup> Blackstone, for example, posited that property is the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." *reprinted in* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 11 (1985). Interestingly, Blackstone's qualifications and exceptions to his own rule consume the next several hundred pages of his *Commentaries*. *Id.* at 13.

<sup>38</sup> One exceptional chronicle of the cultural history of property is Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENVT. L. 279 (1998). For a different approach to conceptualizing property, *See* Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000) (examining rights in the medieval commons and the negative strategic behaviors that result from such arrangements).

<sup>39</sup> Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1998). The fundamental political identity of property may be found in the Constitution through not only the Takings Clause, but also in Congress's creation of property rights. *See* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 311, 431 (2003) (discussing federal legislation creating property rights as "asymmetrically entrenched," in that any repeal of such rights is constrained by Takings Clause, a provision enacted under supermajoritarian voting rule, unlike

may be, the social praxis undermines any notion of completely autonomous ownership:

[n]uisance precludes an owner from using his land in a way that unreasonably interferes with the rights of his neighbor; implied easements and covenants may preclude him from using part, or all, of the land as he wishes; and adverse possession limits his right to leave it idle.<sup>40</sup>

Each of these concepts—nuisance, covenant, and neglect—helps define for the owner the boundaries of propriety in the use of land. But more subtly, each provides a broader social benefit to the community in which the land is situated. Respectively, freedom from injury, transactional certainty, and affirmative responsibilities of inspection all contribute to a more stable public realm. Along with the public criminal laws, including criminal trespass, vandalism, loitering, and burglary, the private law helps “order legal relationships by defining the limits of private conduct in relation to property owners.”<sup>41</sup>

In particular, nuisance law, which protects the right to be free from unreasonable interference with the use or enjoyment of one’s land, provides a healthy measure of control over the ways in which land is put to use.<sup>42</sup> It is a “retroactive mechanism” in

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ordinary majoritarian legislation).

<sup>40</sup> Williams, *supra* note 39, at 283-84. The author notes the irony of the popular image of dominion over property that many hold: “. . . a defender of flag burning who claimed that since ‘it’s my property . . . I have a right to do anything I want with it’ . . . probably does not even have the right to burn dead leaves in his own backyard.” *Id.* at 284.

<sup>41</sup> Kordesh, *supra* note 32, at 422. The author also notes that “[t]he maxim *sic utere tuo ut alienum non laedas* [use your own property in such manner as not to injure that of another] governs the resolution of land use conflicts, whether in planning future relationships or in settling fractured ones.” *Id.* at 421-22.

<sup>42</sup> The hallmark of a private nuisance is the substantial and unreasonable interference of a landowner’s use and enjoyment of property. RESTATEMENT



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which the state can "reorder the legal relationships between disgruntled landowners."<sup>43</sup> Since even an otherwise lawful use can be enjoined as a nuisance,<sup>44</sup> the power of the court can be quite formidable, even within the often narrow confines of the Constitution.<sup>45</sup>

Apart from common law tort, another relational system arose to help regulate land use, the covenant. A subset of the law of servitudes, covenants are contractual devices controlling the future use of land, commonly entered into between buyer and seller. As with servitudes, covenants must "touch and concern" the applicable land, and are subject to the general rule disfavoring restraints on alienation.<sup>46</sup> Nonetheless, because of their private, contractual nature (especially in a regime favoring the private

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(SECOND) OF TORTS, § 822 (1979). While what constitutes a "substantial" interference may be uncontroversial, determining reasonableness is. One definition of an unreasonable interference is "that it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 88, at 626 (5<sup>th</sup> ed. 1984). This formulation, as with most others, unfortunately starts where it ends, and vice-versa.

<sup>43</sup> Kordesh, *Supra* note 37, at 422.

<sup>44</sup> See, e.g., *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972) (enjoining pre-existing farm operation in face of newer residential construction).

<sup>45</sup> Doctrinally, however, nuisance law has had its share of critics. For example, William Prosser, a reporter for the *Restatement (Second)*, has tagged the field a "legal garbage can," consisting mainly of "vagueness, uncertainty, and confusion." William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942).

<sup>46</sup> Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction: Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1386 (1994). For a discussion of the legal criteria concerning servitudes, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 857-61 (4<sup>th</sup> ed. 1998); see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.1 (2000) ("A servitude is created . . . if the owner of the property to be burdened . . . enters into a contract or makes a conveyance intended to create a servitude that complies with [the Statute of Frauds] or . . . conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community.....").

ownership and control of land), the real property covenant provided a contract right in land use enforceable "not only against the promisor landowner, but against his successors in title as well."<sup>47</sup>

The strength of this private regulatory scheme is perhaps best exemplified through its modern incarnation, the residential association. Ranging from condominiums, cooperatives, to homeowners associations, the members of these otherwise unrelated communities are tied together by a series of covenants. Although historically the subject of condemnation, sometimes well-deserved,<sup>48</sup> residential associations may provide benefits which local governments cannot. Since a "locality's boundaries may not coincide with the ideal service area for a good or service," or where "local governments may otherwise be unable either to measure . . . or to provide the service to those who value it most highly,"<sup>49</sup> residential associations may step in, assured that they have their inhabitant's best interests in mind. By providing or contracting out for services, and by holding property in common, the governing body will allocate goods and services at an identical or increased level of efficiency over the local municipality.<sup>50</sup> This "specialized service package" is what sustains the real property covenant as a viable, private mechanism of land use control to the current day.<sup>51</sup>

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<sup>47</sup> DUKEMINIER & KRIER, *supra* note 46, at 857.

<sup>48</sup> For a discussion of residential associations' potential for "irresponsible isolation," see Gillette, *supra* note 46, at 1376-77.

<sup>49</sup> *Id.* at 1388.

<sup>50</sup> *Id.*

<sup>51</sup> "[T]he size of contemporary cities, combined with legal doctrines and political obstacles that prevent localities from differentiating among residents for purposes of service provision, drives some individuals to seek more decentralized institutions to satisfy the search for a specialized service package." *Id.* at 1377.

*C. Summary*

Some four hundred years after settlement of the North American continent, land remains desirable and profitable. Those who control the use and development of real property are at the forefront of modern capitalism. Perhaps more importantly, these entrepreneurs—whether local or global—to this day confer benefits upon the larger citizenry. Just as the royal governors were eager to hand out land to those who would put it to beneficial use (thereby increasing the wealth and prestige of the respective colony), today local municipalities operate under a similar mantra. The new, property-tax rich residential development or the “big-box” retailer offer attractive incentives to individual towns to lure them their way. The principle that unused land is subservient to its developed counterpart—in the eyes of the developer and city council alike—rings true to this day.

But one dramatic difference is apparent: land is no longer abundant. Four hundred years later, much of the entire region has been claimed and developed. The stakes for profitability may remain unchanged, but the effects of development, as a function of the finite amount of land available, have evolved to create an increasing inequity. Specifically, the profitability “pair” has diverged: what is good for the developer is no longer automatically beneficial to the community in which it operates. The remainder of the work will address this issue.

### III. TWENTIETH CENTURY SUCCESSES AND FAILURES

#### *A. The Rise of Industry and Its Discontents*

With a small, dispersed population cultivating seemingly limitless amounts of land, the common law tools of nuisance, custom, and others, together with the equally ancient method of contract, provided a stable and effective platform for both planning and dispute resolution. But as the citizenry grew, along with its technological know-how, real estate was less abundant, and given

a corresponding escalation in density, conflicting land uses became increasingly common. As these conflicts arose, it became apparent to legislators and lawyers alike that the common law cement in land use planning was beginning to crack.

The Industrial Revolution hastened this process of unfastening.<sup>52</sup> As with the tort and contract regimes, the rise of industry brought about a revolution in the law of land use, mostly by necessity.<sup>53</sup> In particular, nuisance was seen as especially unwieldy in providing for responsible large-scale arrangements in the use of land. Fundamentally, those who create a nuisance are subjected to strict liability, in that they act at their own peril; in an agrarian community, the risk of conflict was low.<sup>54</sup> But “new kinds of active uses, dynamic, voracious and large-scale, came to swallow up land and people,”<sup>55</sup> injecting a new dimension into land use disputes: cost internalization.<sup>56</sup> By holding tortfeasors strictly liable for all injuries caused, profits diminished.<sup>57</sup> Some measure of fault, foreign to nuisance law, was instead the preferred mode of resolution.<sup>58</sup> But substituting a negligence standard had its

<sup>52</sup> See, e.g., *Nashville & Chattanooga R.R. Co. v. Messino*, 33 Tenn. 220, 224 (1853) (“The appalling disasters that are so frequently occurring, excites a general desire and expectation that the courts will hold [railroads] to that care and diligence, which the law prescribes.”); see also JAMES W. ELY, JR., *RAILROADS & AMERICAN LAW* 211-24 (2001).

<sup>53</sup> For a discussion on the effects of the Industrial Revolution on American tort and contracts jurisprudence, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 467-87, 532-43 (2<sup>nd</sup> ed. 1985) [hereinafter FRIEDMAN I], “The modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity to for smashing the human body.” *Id.* at 467.

<sup>54</sup> “While there may be cross-boundary annoyances in an agrarian economy, where land is wealth, not many land uses conflict. . . . A rule of strict liability in regard to interference with land use was functional at the inception of the doctrine and for centuries thereafter, at least insofar as it protected established sources of wealth.” Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 101 (1998).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 102.

<sup>57</sup> *Id.*

<sup>58</sup> “[N]egligence was the favored doctrine of an emerging entrepreneurial

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own share of difficulties: allowing owners "special rights to do injury to the more passive uses of their neighbors" was seen as a declaration antithetical to the "fundamental liberal principle that rights in property are not dependent upon the quantum of property owned."<sup>59</sup>

As a result, nuisance law simply could not handle the legal, social, and economic ramifications of industrialization. Driven by notions of private ownership in real estate dating to Blackstone,<sup>60</sup> "the mix of sweatshops, coal-fired industrial plants, and densifying urban living conditions helped lead a reform movement to develop new work standards and a newly focused urban planning profession."<sup>61</sup> This new focus was driven by the incompatibility of a modern mechanized work force with a rapidly aging nineteenth-century *laissez faire* approach to private property.<sup>62</sup> Specifically, the government began taking a proactive, regulatory role in the affairs of its citizens. By the 1930s, and spurred by the Great Depression, Roosevelt's Works Progress Administration<sup>63</sup> set the unemployed to "building up the nation's power, water, and

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class that argued that there should be no liability for socially desirable activity that caused injury without carelessness and strict liability was seen as a burden." *Id.* (quoting MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 124 (1992)) (internal quotations omitted).

<sup>59</sup> Halper, *supra* note 54, at 104.

<sup>60</sup> Although Blackstone was undoubtedly a leading early commentator, the origins of Anglo-American notions of private property can be traced to the eleventh century reign of William the Conqueror, or earlier. See THEODORE FRANK THOMAS PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 12 (5th ed. 1956) (discussing *Domesday Book* as a catalyst for the common law). See also DAVID BATES, *WILLIAM THE CONQUEROR* 158 (1989) (pointing out the coercive nature of land transfers following the Norman invasion).

<sup>61</sup> Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?* 21 WM & MARY ENVTL. L. & POL'Y REV. 345, 353 (1997).

<sup>62</sup> See generally G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (arguing that the Supreme Court's repudiation of *laissez faire* constitutional interpretation actually occurred well before the New Deal and its accompanying "court-packing" crisis).

<sup>63</sup> See Federal Emergency Relief Act of 1933, ch. 30, 48 Stat. 55 (1933).

transportation infrastructure".<sup>64</sup> This increased role of government in Americans' lives, reminiscent of the colonial legislation aimed at serving the public good through coercive land use policies, also helped spawn the ambitious Interstate Highway System contemplated in the 1950s.<sup>65</sup> Just as nineteenth-century pioneers ventured from the established East Coast cities in search of new opportunities, the twentieth-century "frontier" was beginning to crystalize, as those who could leave the crowded urban centers did so. Their less fortunate counterparts—the legions of factory workers, laborers, and the unemployed—were left to personify the ill effects of industrialization.

With the common law at a loss for answers, and the Takings Clause a bar to direct and coercive initiatives, the reform movement instead looked to another long-standing legal orthodoxy for assistance, the police power. Although never specifically codified, this inherent state power to regulate the health, safety, and welfare of its citizens was acknowledged by the framers of the Constitution as the seat of a federalist system.<sup>66</sup> Given that the rise of industry had begun to affect all three prongs of the police power, perhaps a new method of controls could be formulated, consistent with the Constitution, the powers of the states, and the reform spirit that was at work eroding the jurisprudential status

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<sup>64</sup> Epstein, *supra* note 61, at 354.

<sup>65</sup> "In some ways, the latter work accelerated in the post-World War II era, when the federal government committed to fund a substantial proportion of the nation's roads and bridges out of general tax revenues. . . ." *Id.* For the Interstate Highway System, see Interstate Highway Act, Pub. L. No. 85-767, 72 Stat. 885 (1958).

<sup>66</sup> See, e.g., U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 280-81 (1988) (detailing the debates surrounding amendment's passage); GOTTFRIED DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 261 (1962) (quoting Madison: "Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation [the charter is] a *federal*, and not a *national* Constitution.") (emphasis in original).

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quo? The solution, as it turned out, was not to be found in the  
often asymmetrical battle between use and interest, but instead in  
the smooth grids of Euclidian geometry.<sup>67</sup>

*B. The Constitution and the Regulatory State*

By the second decade of the twentieth century, the march  
of industry had crept close enough to both urban and rural centers  
to raise a red flag in the eyes of local lawmakers.<sup>68</sup> Realizing that  
traditional legal mechanisms were no longer effective in  
channeling land use disputes to an adequate resolution, these  
legislative actors began experimenting with a new form of land use  
regulation. Rooted in the police power, zoning legislation is  
designed to create an orderly division of uses in a given area of  
land within a municipality or town.<sup>69</sup> By dividing land according

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<sup>67</sup> Euclid, while noted in the legal world as the town that put zoning onto  
the constitutional map, was also a Greek mathematician who lived around 300  
B.C., and is generally credited with inventing the modern field of geometry with  
his thirteen-volume *Elements*.

<sup>68</sup> Zoning regulations, and unsuccessful challenges to them in the United  
States Supreme Court, had in fact emerged long before the 1920s. However, it  
was at this later date that the Supreme Court began addressing the  
constitutionality of zoning itself. See generally Joseph Gordon Hylton, *Prelude  
to Euclid: The United States Supreme Court and the Constitutionality of Land  
Use Regulation, 1900-20*, 3 WASH. U. J.L. & POL'Y 1 (2000) (collecting late  
nineteenth- and early twentieth-century zoning cases and arguing that ensuing  
Supreme Court opinions provided pro-regulation backdrop to *Euclid*). Such pre-  
New Deal support for increased governmental regulation is consistent with the  
contentions in WHITE, *supra* note 62, at 33, 94, 128 (collecting regulation-  
friendly cases in the fields of foreign relations, administrative law, and free  
speech, respectively). But cf. Charles M. Haar & Michael Alan Wolf, *Euclid  
Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158,  
2159 (2002) ("Many Court observers may be surprised to learn that this strong  
endorsement of government regulatory activity occurred in the mid-1920s,  
during the era of constitutional jurisprudence most closely associated with  
*laissez-fair* and conservative judicial activism").

<sup>69</sup> See BLACK'S LAW DICTIONARY 1114 (6<sup>th</sup> ed. 1990) (defining zoning as  
"[t]he division of a city or town by legislative regulation into districts and the  
prescription and application in each district of regulations having to do with

to use, legislatures are able to anticipate any smoldering conflicts between current landowners, and stave off future conflagrations. Whether such a legal blueprint, unknown to the common law and suggestive of the pre-Constitution colonial decree, would withstand constitutional scrutiny was, however, yet to be resolved. That is, until a small real estate company in the metropolitan Cleveland area emerged.

In 1922, Ambler Realty Company held a sixty-eight-acre parcel of land for industrial development in Euclid, Ohio, a small community of around ten thousand residents.<sup>70</sup> Due to Euclid's comprehensive town zoning ordinance, however, part of Ambler's property was zoned for single-family and other limited residential uses; all industrial use in this portion was prohibited. Thereafter, Ambler filed suit in federal court, challenging the town's ordinance on due process, equal protection, and taking grounds. The District Court sided with Ambler, finding that:

the ordinance involved, as applied to plaintiff's property, is unconstitutional and void; that it takes plaintiff's property, if not for private, at least for public, use, without just compensation; [and] that it is in no just sense a reasonable or legitimate exercise of police power.<sup>71</sup>

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structural and architectural designs of buildings and of regulations prescribing use to with buildings within designated districts may be put").

<sup>70</sup> This account is from Jon W. Bruce, *Euclid v. Ambler Realty Co.*, in *THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS* 86-87 (Kermit L. Hall ed., 1999). For a more detailed history of the litigation and the people involved, see William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 31, 33-35 (Charles M. Haar & Jerold S. Kayden eds., 1989); Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE W. RES. 617, 617 (2001) ("The decision provided the constitutional foundation for an explosive growth in modern zoning, subdivision controls, and other governmental land use regulation that has transformed the organization and development of land and communities.")

<sup>71</sup> *Ambler Realty Co. v. Euclid*, 297 F. 307, 317 (N.D. Ohio 1924).



The lower court was also concerned about the potential abuse of the police power in zoning generally:

If [the] police power meant what is claimed, all private property is now held subject to temporary and passing phases of public opinion, dominant for a day, in legislative or municipal assemblies.<sup>72</sup>

Zoning as a land use tool, for all of its prophylactic effects, was nonetheless too extreme a measure, according to the court, for the Constitution to tolerate.

But on appeal, the Supreme Court reversed, and expressly endorsed the constitutional validity of zoning and its relationship with the police power.<sup>73</sup> Although the Court made it clear that it was only passing upon the general legitimacy of zoning as a regulatory concept, Justice Sutherland, who authored the twenty-page opinion for the six-justice majority, noted that while constitutional guaranties will not vary, the "scope of their application must expand or contract to meet the new and different conditions which are constantly coming within . . . their operation."<sup>74</sup> With this the Court gave a subtle nod to zoning's predecessor, nuisance, and its future displacement as the leading mechanism for controlling land uses.<sup>75</sup>

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<sup>72</sup> *Id.* at 314.

<sup>73</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90, 397 (1926) ("If it be a proper exercise of police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. . . . [T]he ordinance in its general scope and dominant features . . . is a valid exercise of authority....").

<sup>74</sup> *Id.* at 387.

<sup>75</sup> "A nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard. If the validity of the legislative

Zoning offered several advantages over a nuisance-based system of land use law. Instead of the case-by-case nature of making decisions through common law adjudication, the comprehensive zoning scheme allowed for a stable, predictable bureaucracy to materialize.<sup>76</sup> This regulatory pattern—the “broad brush of zoning”—in turn helped displace other cumbersome methods of nuisance abatement, such as the special legislative enactment.<sup>77</sup> What eventually grew to take the place of nuisance was the Standard State Zoning Enabling Act (SSZEA), a model act which provided the medium for states to devolve land use authority to the local governing body.<sup>78</sup> By codifying the SSZEA, states were opting for the benefits associated with exacting code standards: coherence, stability, and an ease of enforcement and interpretation.<sup>79</sup> Furthermore, the language of the act suggests dramatic improvements in community milieu:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; . . . [and] to facilitate adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.<sup>80</sup>

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classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” *Id.* at 388. *See also* *Radice v. New York*, 264 U.S. 292, 294 (1924) (“Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.”).

<sup>76</sup> Halper, *supra* note 54, at 115.

<sup>77</sup> *Id.*

<sup>78</sup> *See supra* note 4, (discussing SSZEA).

<sup>79</sup> Epstein, *supra* note 61, at 358.

<sup>80</sup> SSZEA, *supra* note 4, at §3.

Through this statutory framework, states and the communities that comprise them could undertake to repair the damage industrial and urban growth had left in their unrelenting paths. The rigid nature of a regulatory scheme was a fundamental break from the *laissez faire* controls characteristic of the nineteenth century, one which held the promise for a panacean solution.

### C. Zoning and the Local Prerogative

One intended effect of zoning and the SSZEA was to delegate state power to the local government subdivision, thereby furnishing an almost exclusive measure of flexibility and control over the safe and orderly development of the municipalities' built environment and future economic growth. By placing the land use decision making apparatus in the hands of the smallest regulatory unit, the most efficient—and least intrusive—allocation of resources would presumably follow, freeing the States to concentrate their political capital on more far-reaching concerns.<sup>81</sup> Indeed, the decisional framework was successful in the immediate aftermath of *Euclid*: the former battleground of incompatible uses adjusted well to the cease-fire zoning mandated.<sup>82</sup> The

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<sup>81</sup> One commentator has noted three distinct elements of zoning that flowed from *Euclid*: first, "the Court prescribed a flexible approach in the legislative implementation and judicial review of public land use planning devices. Second, the Court endorsed careful, expert-based planning, eschewing the haphazard vagaries of the market. Third, the Court approved the transfer, from individual to collective ownership, of developmental rights above a level often labeled 'reasonable return.' These three elements have remained inviolate, despite years of experimentation and variation." Michael Alan Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 U. RICH. L. REV. 961, 963 (1996) (citations omitted).

<sup>82</sup> For all of its solutions, zoning has nonetheless remained a controversial and much-litigated subject. See, e.g., *Rockhill v. Township of Chesterfield*, 128 A.2d 473 (N.J. 1957) (minimum districting requirements of comprehensive plan); *Vernon Park Realty, Inc. v. Mt. Vernon*, 121 N.E.2d 517 (N.Y. 1954) (spot zoning); *Carpenter v. Zoning Board of Appeals of Framingham*, 223 N.E.2d 679 (Mass. 1967) (specification zoning); *Nat'l Land and Inv. Co. v. Easttown Township*, 215 A.2d 597 (Pa. 1965) (required link between acreage

comprehensive plan, it seemed, had taken its rightful place in the forefront of modern land use law.

But as the century progressed, the population continued to grow, as did the reach of industry, especially in the years immediately following World War II.<sup>83</sup> Increasingly, land became more valuable as it was slowly swallowed up by yet more residential, commercial, and industrial development.<sup>84</sup> With this increase in population and its corresponding need for more resources, both built and natural, several pervading shortcomings emerged in the dominant land use scheme: the presence of urban sprawl, a degradation of the environment, and a host of detrimental consequences that flowed directly from them.<sup>85</sup> Ironically, local

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and its police power justification); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (due process considerations); *Bd. of County Comm'rs v. Snyder*, 627 So. 2d 469 (Fl. 1993) (quasi-judicial proceedings); *see also* Wolf, *supra* note 81, at 962 (“[T]he words of *Euclid* uncannily predicted four leading strands of land-use challenges in the succeeding six decades, challenges based on the exclusion, anticompetitiveness, parochialism, and aestheticism inherent in Euclidian zoning and comprehensive planning”).

<sup>83</sup> *See, e.g.*, LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 404 (2002) (hereinafter *FRIEDMAN II*) (discussing Housing Act of 1949 and its goal of curing nation’s “serious housing shortage”).

<sup>84</sup> *Id.* at 187 (“The end of the [second world] war seemed to pose a huge new danger: millions of soldiers, sailors, marines, and airmen would be dumped back on the labor market — the market without the artificial stimulus of war.”).

<sup>85</sup> “In a way, the planning system, land use law, and related federal and state public policy wrought out of those early reform movements have performed ‘successfully.’ That is, many of the ends planning and law sought to achieve (or which were inevitable, although not necessarily intended) have been achieved: a recognizable, regularized land use system is in place virtually throughout the nation; work has largely been divorced from home, and home from play, school, civic, and commercial life; all forms of multifamily housing have been separated from single family housing; real property values have been protected in direct proportion to those properties’ exclusivity; rich have been segregated from poor; a great suburban migration, of both population and financial resources, has been encouraged, and even energized; a ground transportation system has been unified virtually into one mode; and both suburban and exurban environmental resources are almost guaranteed to be wastefully consumed or severely impacted. Epstein, *supra* note 61, at 378.

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planning decisions unwittingly aided in the rise of these  
contemporary ills.<sup>86</sup> The virtue of zoning—its local purview—was  
transforming into its vice.<sup>87</sup>

Industry's compromising of the natural environment was  
seen early on as an unfortunate byproduct in the "modern" world.<sup>88</sup>  
Factories, railroads, and electric plants all consumed natural  
resources and necessarily produced waste. So long as the  
population was spread out—and these concerns could be placed far  
out of sight—there were no noticeable effects. But as pollution  
became increasingly apparent, an environmental ethic slowly  
began to emerge. By the 1970s, the environment had come to the  
forefront of the nation's conscience.

With the passage of legislation such as the National  
Environmental Policy Act (NEPA),<sup>89</sup> Congress codified this new  
environmental awareness.<sup>90</sup> Although sometimes difficult to square  
with traditional common law concepts, such as fault, liability, and  
other jurisprudential concerns,<sup>91</sup> the federal legislation has, at the

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<sup>86</sup> The provenance of case law and professional urban planning training  
and practice has, at least in some part, directly led to a situation where the very  
opposite of land law's noble aims and the planning profession's grand visions is  
now occurring." *Id.* at 346.

<sup>87</sup> *Id.* at 371.

<sup>88</sup> Friedman has identified several factors which hastened the subsequent  
rise of the nation's environmental ethic. In particular, intense economic growth,  
the realization that resources were actually disappearing, and an increased  
habitation of professionals, bureaucrats, academics, and intellectuals within the  
government all combined on an issue "for which the time was somehow ripe."  
FRIEDMAN II, *supra* note 83, at 680.

<sup>89</sup> 42 U.S.C. §4321 *et seq.* (2002)(hereinafter NEPA).

<sup>90</sup> "The Congress, recognizing the profound impact of man's activity on  
the interrelations of all components of the natural environment, particularly the  
profound influences of population growth, high-density urbanization, industrial  
expansion, resource exploitation, . . . and the critical importance of restoring and  
maintaining environmental quality to the overall welfare and development of  
man, declares that it is the continuing policy of the Federal Government . . . to  
use all practicable means and measures . . . in a manner calculated . . . to create  
and maintain conditions under which man and nature can exist in productive  
harmony..." *Id.* at §4331(a).

<sup>91</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (refusing to

very least, provided a platform from which further initiatives may be formulated. Specifically, the multitude of acts promulgated two progressive themes: first, that the *nation's* legislative body recognized that the protection of the environment was an issue of national scope, crossing state political boundaries, and second, that the remedies prescribed would take place through a *nation-wide* infrastructure. The relevant environmental "region" was not a local concern, but rather an apolitical, unifying aspect of all Americans' lives.

Another major issue in land use to evolve in the twentieth century was the unrestrained residential and commercial growth outside of the central urban area, infamously known as sprawl. Sprawl has been defined many different ways; generally, it is characterized by "low-density development beyond the edge of service and employment, which separates where people live from where they shop, work, recreate, and educate—thus requiring cars to move between zones."<sup>92</sup> In particular, sprawl consists of single-family residential developments accompanied by strip commercial centers and industrial parks, built in rural and undeveloped areas.<sup>93</sup>

No matter what its exact definition, however, sprawl requires several principal conditions for its existence: it emerges in the surroundings of fragmented, rapidly-expanding metropolitan areas; it is characterized by low density, with an almost complete dependence on the automobile; a disparity in ability to finance public services between urban and suburban areas is present; and, generally, there exists a similar disproportion in public investment.<sup>94</sup> One commentator has described the visual impact of

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construe Administrative Procedure Act's standing provision to "authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.")

<sup>92</sup> JOHN R. NOLON, *WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 1* (2001) (citing 1998 report from the Sierra Club, *The Dark Side of the American Dream*).

<sup>93</sup> Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 137 (1999); see also Epstein, *supra* note 61 at 347.

<sup>94</sup> Epstein, *supra* note 61, at 347. See also Henry Richmond, *Sprawl: Its*

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sprawl as consisting of endless housing subdivisions, shopping centers (variously designated as “strip” malls or “big-box” retail outlets), office and business parks, civic institutions, and roadways.<sup>95</sup> Alone, none are inherently harmful. But in uncoordinated combination, this development pattern threatens the social and natural fabric of community and ecosystem alike.<sup>96</sup>

The social currents that evolved over the course of the twentieth century, including the rise of zoning as the predominant land use control mechanism, directly influenced the rise of sprawl. In particular, the rigid districts of the comprehensive plan that were designed to engender a systematic, spatial segregation of uses, are now, extrapolated to the present day, extraordinarily and inefficiently separated.<sup>97</sup> This isolation in turn increases the reliance upon new transportation infrastructure, especially in areas where the urban center still maintains a concentration of employment opportunities. But with residence and work spread further apart, the only viable means of transport becomes the automobile.<sup>98</sup> This dependence, in turn, results in the need for

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*Nature, Consequences, Causes, and Remedies*, LAND PATTERNS (Land Stewardship Project’s 1000 Friends of Minnesota Program) Spring 1996, at 1.

<sup>95</sup> ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 6 (2000). In the case of the seemingly innocuous civic institutions, the authors point out the difference between a traditional public school at the heart of a neighborhood and the suburban school complex surrounded by parking lots and locate “nowhere in particular.” *Id.*

<sup>96</sup> There are political dimensions to sprawl as well. In one contemporary example, the proposed placement of a Wal-Mart big-box store in Smyrna, Delaware, has ignited a political firestorm, with proponents charging that a pending lawsuit against the town is costing taxpayers in money and aggravation. Opponents, on the other hand, charge that town officials and developers are working together to generate maximum profits in taxes or revenues, at the expense of the built and natural environment. This latter group advocates a “traditional town approach” to growth, rather than the “developer-driven sameness engulfing” the region. Michael McGrath, *Smyrna Needn’t Be Eaten Up by Sprawl*, NEWS J., Jan. 8, 2003, at A11.

<sup>97</sup> Burchell & Shad, *supra* note 93, at 141.

<sup>98</sup> Beyond the environmental damage that some commentators argue is inevitable in the age of the sport utility vehicle, easily recognizable — and universally loathed — derivatives of massive dependence on the automobile

more and more parking lots to store vehicles, and an ever-increasing clamor for more roads to get between them. As a result of this aggregation of needs, an inordinate and unnecessary amount of land is consumed.<sup>99</sup>

But how is zoning—a relatively environmental- and economically-neutral, seemingly benign decision-making apparatus—implicated in this societal quicksand? Population expansion, and its built-in consequences, is inevitable, is it not? The long view, perhaps unduly pessimistic, is that *all* land will someday be developed, resulting in a Hardinian tragedy of apocalyptic magnitude.<sup>100</sup> A more realistic notion, however, is that zoning has somehow gone astray, varying from its original ideals. Instead of an impending doom, there exists a developmental dysfunction, capable of remedying.<sup>101</sup> Mazes of highways, strip

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include traffic congestion and parking scarcity. Despite constant calls for new construction, it has long been known that additional capacity only leads to increased driving. See, e.g., STANLEY HART & ALAN SPIVAK, *THE ELEPHANT IN THE BEDROOM: AUTOMOBILE DEPENDENCE AND DENIAL; IMPACTS ON THE ECONOMY AND ENVIRONMENT* 122 (1993). To take highways as an example, the real constraint on driving is traffic, not cost; when drivers know there is no traffic, they will be more willing to make the trip.. This state of affairs, known as latent demand, makes adding lanes futile, since there will always be a contingent of drivers waiting to fill them up. See DUANY ET AL., *supra* note 95, at 91. Cf. Caren Halbfinger, *Studies Could Spur New Garage At North White Plains Train Station*, J. NEWS, Feb. 9, 2003, at 3B (quoting local railroad's director of long-range planning: "Our expectation is it [parking demand] will keep growing. We're going to determine demand and *where it's coming from*." (emphasis added)).

<sup>99</sup> "There are no significant disincentives—legal, economic, or social—to the increased popularity of these beltway behemoths that grow at the expense of, not in concert with, the older urban centers in the region." Wolf, *supra* note 81, at 983.

<sup>100</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

<sup>101</sup> Justice Sutherland himself, writing for the majority in *Euclid*, warned that "[i]t is not meant by this [finding zoning constitutional], however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Village of Euclid v. Ambler Realty Co.*, 272 U.S.



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malls, cul-de-sacs, and decaying neighborhoods are not the natural byproducts of progress, but rather the offspring of a "legal framework within which sprawl [fragments] into numerous relatively small units, separately controlled by discrete local governments with unique rules and regulations."<sup>102</sup>

#### *D. Summary*

Zoning addresses the need for a universal, efficient system of land use controls. With the Supreme Court's imprimatur of approval, and the drafting of the SSZEA, the zoning-comprehensive plan provided a uniform blueprint for resolving the rise of industry and its discontents. But innate to this new framework, and in tension with its promised regulatory attributes, is a fundamental reliance on the local municipality to ensure that disparate, and often far-reaching, land uses somehow remain in harmony. This local dependence, constructed at the expense of the other layers of sovereignty at the county, state, and federal levels, eventually contributes to the neglect of the both the natural and built environment; at the close of the twentieth century, industry and development had once again taken control at the expense of the larger citizenry. Although the slums and blight of the early cities have been mostly eradicated, their modern counterpart has emerged in the form of environmental degradation and urban sprawl. Furthermore, these effects are no longer contained within the metropolitan limits. The local reliance inherent in zoning, although not entirely responsible for these developments, certainly has played a major part in allowing such conditions to arise. At the dawn of the twenty-first century, with the past successes and

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365, 390 (1926).

<sup>102</sup> Burchell & Shad, *supra* note 93, at 141. Included among these "discrete" actors are the suburban inhabitants themselves, who may be susceptible to heuristic biases that encourage sprawl. See Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 473 (2003) (discussing heuristics of mental accounting and availability in context of suburban lifestyle choices).

failures as a guide, a more dynamic and malleable system of land use controls is required, one that can respond more effectively to the social, economic, and environmental needs of the residential and commercial communities which comprise modern life.

#### IV. DYNAMIC LAND USE PLANNING

In the new, one-million-dollar-plus residential developments of Soho, Central Park, and Manhattan Gardens, residents feel like they have finally come home. With landscaped backyards, swimming pools, and barbecues, the gleaming, free-standing dwellings offer an idyllic setting for chasing the American Dream. Even better, these residences are surrounded by quaint villages and fields, and are a traffic-free hour-long drive to the nearest city. How is this possible? In this case, the big city is Beijing, China, and the developments are modeled directly after the California suburbs (despite the New York-inspired names)—a “faux Los Angeles,” imported by West Coast architects and thrust into the middle of the Chinese countryside.<sup>103</sup> The upscale residents are offered American living without American hassles. That is, until the recently completed twin six-lane superhighways that shadow the community become operational.<sup>104</sup>

The experience in China underscores the realities of consumer desire in housing and community, along with the modern building practices that have matured alongside this mindset. Although American values of community—the relationships with neighbors, friends, and family—have not changed much in the century just past, other external factors affecting them have. The transformation to a post-industrial information economy, the expansion in population, and the resulting fractionalization along political and economic lines, all have led to an increased migration

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Elisabeth Rosenthal, *North of Beijing, California Dreams Come True*, N.Y. TIMES, Feb. 23, 2003, at A3.

<sup>104</sup>

This “suburb without suburbia” is located less than ten miles from the site of the 2008 Olympic Games, and as a result is slated for “rapid development.” *Id.*

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away from the cities. The result has been the birth and rise of the suburbs: not quite urban, not quite country. A house in suburbia exemplifies the American Dream; it is an environment in equilibrium, avoiding the crime and cramped conditions of the city, while simultaneously rejecting the potential isolation that country living entails. This "best of both worlds" mentality, perhaps a residual effect from the frontier aspirations of the nineteenth century, is not surprising in light of the prosperity and rise in the standard of living in America since World War II.<sup>105</sup> However, this mentality, beneficial to its immediate surroundings, ultimately proves to be unhealthy for the larger region.

Part IV will highlight some of the detrimental ramifications unaccounted for in the American Dream. It will also argue that the dominant mode of development controls today, led by the comprehensive zoning plan, has unwittingly allowed—and even encouraged—this state of affairs to materialize. This part concludes with a discussion of potential solutions to the land use dilemma, including one approach already undertaken at the county level.<sup>106</sup>

#### A. *Why Dynamic Land Use Planning?*

In his *Land Use Controls in America*, John Delafons describes the modern zoning system in terms of a "prairie psychology," a uniquely American perspective.<sup>107</sup> Compared to his native England, Delafons notes that development patterns in the United States have treated land as nearly an unlimited resource, one which is open to all, vigorously protected by a written

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<sup>105</sup> For an account of one particularly affluent region confronting the rise of suburbia, see Janet Kealy, Note, *The Hudson River Valley: A Natural Resource Threatened by Sprawl*, 7 ALB. L. ENVTL. OUTLOOK 154 (2002).

<sup>106</sup> This paper discusses general solutions, and focuses on the specific plan for Chester County, Pennsylvania, as a progressive regional model. For a survey of the various state initiatives already in place, see Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601 (1999).

<sup>107</sup> JOHN DELAFONS, *LAND USE CONTROLS IN THE UNITED STATES* (1962).

constitution, but controlled by disparate economic forces which are not fully understood.<sup>108</sup> In addition, development professionals, while able to prepare land for construction and improvement in an efficient manner, are excluded from the decision making processes that determine whether the respective land ought to be developed at all.<sup>109</sup> Inextricably bound up in this system, as Delafons observes, is a basic mistrust of government officials, which translates into a development protocol characterized by minimal public review and an “as of right” land use mentality.<sup>110</sup> In short, American zoning codifies a framework in which provincial and incremental building occurs—a framework that encourages sprawl.

One byproduct of sprawl is an increasing fractionalization of the social fabric. At best, such a process results in the loss of community and a consequent feeling of isolation; at worst, it provides a framework for discrimination along racial and economic lines. Even within the limits of one city, “everyone knows where they don’t belong.”<sup>111</sup> One example is the segregation of housing by market segment, in which developers, seeking to distinguish their mass-produced products, sell “exclusivity” to prospective home buyers.<sup>112</sup> What follows is a “suburban pod system,” in which economic mobility necessarily entails the abandonment of neighborhood and community.<sup>113</sup> With residential development so structured, one cannot “move up without moving out.”<sup>114</sup>

Another uninvited derivative of sprawl is the slow decay of the urban center, caused by the movement of suburban

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<sup>108</sup> See generally *id.* Delafons’s findings are summarized in Burchell & Shad, *supra* note 93, at 139.

<sup>109</sup> Burchell & Shad, *supra* note 93, at 139.

<sup>110</sup> *Id.*

<sup>111</sup> Jerry Frug, *Surveying Law and Borders: The Geography of Community*, 48 STAN. L. REV. 1047, 1047 (1996) (“Traveling through this mosaic of neighborhoods, metropolitan residents move from feeling at home to feeling like a tourist to feeling out of place that they are afraid for their own security.”).

<sup>112</sup> See DUANY ET AL, *supra* note 98, at 43.

<sup>113</sup> *Id.* at 44.

<sup>114</sup> *Id.*

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development rings farther into the surrounding landscape. Although the major American cities remain for the most part the financial capitals of the national and regional economies, increasingly these business hubs are all that remain, as lesser service-oriented enterprises have followed the population away from downtown. In addition, many new businesses are avoiding the city altogether, opting for the auto- and tax-friendly commercial office park. As businesses move out, the urban core becomes hollow, and a "vacuum of crime, joblessness, poverty, infant mortality, and crumbling infrastructure" sets in.<sup>115</sup> Literal decay has also been hastened by governmental policies, most notably the infamous urban renewal projects of the 1950s.<sup>116</sup> Unwittingly, existing zoning policies encourage such flight from the cities, as fresh development in previously open lands is cheaper and readily districted. Conversely, the preexisting urban neighborhoods, already built and zoned, discourage redevelopment.

The result is an exodus to the countryside, not by just individuals, but by the developers themselves. The prime location for future suburban planning is the exurban forest, field, and beach, places where legal complexity and community opposition are low, and profit-margins are high.<sup>117</sup> These exurban landscapes are ripe

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<sup>115</sup> Epstein, *supra* note 61, at 351.

<sup>116</sup> See, e.g., Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 64-68 (1967) (discussing the social and political limitations of federal oversight in urban renewal projects).

<sup>117</sup> A well-known phenomenon impeding redevelopment efforts is the prevalence of so-called NIMBYs ("Not In My Back Yard"), the derogatory term used to characterize community groups, which oppose any development in their neighborhoods. Understandably, developers will tend to avoid such built-up areas—and the costs attendant with redevelopment—and opt instead for the surrounding undeveloped tracts.

One group of authors has characterized "Nimbyism" as a "uniquely American form of schizophrenia." DUANY ET AL., *supra* note 98, at 42. In particular, such individuals will extol the virtues of their neighborhood while simultaneously attempting to exclude others because "new suburban development does not provide them with any more of the satisfying private

for zoning, and usually stocked with receptive municipal officials eager to obtain the high tax ratables that mass development provides.<sup>118</sup> The competition this process engenders in turn results in the impoverishing of neighboring communities, and, in the long term, may backfire politically and economically on the town, as the costs of excessive or unplanned development ultimately begin to outweigh the short-term revenue benefits.<sup>119</sup> Overall, the threat of sprawl to the national landscape is also a cause for concern; in the agrarian setting, for example, one commentator has pointed out that the first five percent of development often degenerates fifty percent of the overall tract.<sup>120</sup>

*B. Beyond Zoning: Regional and Other Approaches to Planning*

As a legal mechanism, zoning allows development to follow the path of least resistance into the countryside. What began as an attempt to reconcile the disparate and incompatible uses of an industrial society in primarily urban communities has now become the catalyst for change in the urban landscape. But rather than evolving with the shifts in society, zoning, while fundamentally still sound, has not and cannot confront the exurban development patterns now so widespread. Instead of a static, use-based planning medium—one which is based solely on the

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realm that they love; it only gives them more of the degraded public realm toward which they feel indifferent at best.” *Id.* For an analysis of the efforts of NIMBYs to resist low-income housing, see Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLANNING ASS’N 288 (1982).

<sup>118</sup> See, e.g., Epstein, *supra* note 61, at 363. The municipal race for tax dollars is eerily reminiscent of the states’ eager participation in the railroad industry in the early nineteenth century, a practice, which nearly bankrupted them. See FRIEDMAN I, *supra* note 53, at 193. See also *Mott v. Pennsylvania R.R. Co.*, 30 Pa. 9 (1858) (holding legislation exempting railroad from all taxation unconstitutional under state constitution).

<sup>119</sup> Epstein, *supra* note 61, at 363.

<sup>120</sup> Randall Arendt, *The Metropolis Has a Necessary and Fragile Relationship to Its Agrarian Hinterland and Natural Landscapes*, in Cong. For the New Urbanism, CHARTER OF THE NEW URBANISM 29, 32 (Michael Leccese & Kathleen McCormick eds., 2000).

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prerogative of the local governmental body—a more fluid and less parochial approach is warranted. This new strategy, while not rejecting zoning at the conceptual level, must rather build upon its foundation and be capable of addressing the needs of developer, resident, neighborhood, and landscape. In short, the next step in land use planning will require a dynamism not seen in the previous regimes of nuisance and contract at common law, nor in the regulatory geometry of Euclidian zoning and its offspring.<sup>121</sup>

In recent years, this dilemma has been identified by the planning community, and the ideas it has generated have steadily grown in numerosity. One of these schools of thought in particular, “new urbanism,”<sup>122</sup> has received attention from some local and state governmental bodies.<sup>123</sup> Peter Calthorpe, co-author of *The Regional City*,<sup>124</sup> perhaps best exemplifies the ideas that this particular strand of the planning community has engendered in response to the problems that have emanated primarily from the

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<sup>121</sup> Over the years, zoning has struggled to evolve alongside the changing needs of the local population. So-called “post-modern” zoning has picked up some of the slack, however, with innovations such as floating zones, phased growth, planned unit developments, and others. *See, e.g.,* French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976) (transferable development rights), *cert. denied*, 429 U.S. 990 (1976); Golden v. Ramapo Planning Bd., 285 N.E.2d 291 (N.Y. 1972) (phased growth); Rodgers v. Tarrytown, 96 N.E.2d 731 (N.Y. 1951) (floating zones); Rudderow v. Mt. Laurel Tp. Comm., 121 N.J. Super. 409 (App. Div. 1972)(planned unit developments).

<sup>122</sup> *See, e.g.,* Burchell & Shad, *supra* note 93, at 153 (summarizing the urban design movement’s goals of removing “. . . segregated, single uses, cul-de-sacs, low densities, and automobile-dominated neighborhood access” from land use planning).

<sup>123</sup> *See, e.g.,* Parris N. Glendening, *Maryland’s Smart Growth Initiative: The Next Steps*, 29 FORDHAM URB. L.J. 1493 (2002); *see also* PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL* 105-90 (2001) (hereinafter REGIONAL CITY) (collecting municipal and state initiatives throughout nation).

<sup>124</sup> *See* CALTHORPE & FULTON, *supra* note 123. The former author helped originate the ideals of new urbanist thought in PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* (1993).

legal system's neglect of the changing realities of land use in the United States.

In their work, Calthorpe and Fulton argue that the central issue confronting the planning profession is not that cities and suburbs lack design, but rather that the design itself is flawed.<sup>125</sup> With the rise of mass-production standardization as the dominant industrial method throughout the nation, these characteristics of the industrial economy have migrated to the land use planning domain. Specifically, this translates into isolated uses of land—residential, retail, commercial, and civic—each designed by respective experts, without regard for the aggregate picture.<sup>126</sup> Furthermore, this pattern is self-reinforcing: “The logic of mass production moves relentlessly toward ever-increasing scales, which in turn reinforces the specialization and standardization of everyday life.”<sup>127</sup>

Instead, the theory of effective land use planning must be reconceptualized, one which rejects the above approach in favor of certain fundamental “building blocks,” specifically, centers, districts, preserves, and corridors, which combine uses and functions.<sup>128</sup> The foundational block, the neighborhood, represents the springboard for further planning needs; in combination, neighborhoods “telescope into a regional plan” capable of addressing the problems associated with sprawl.<sup>129</sup> Accordingly, the goal is a regional perspective of land use, where local communities are seen as part of a whole, rather than in competition with each other.

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<sup>125</sup> See REGIONAL CITY, *supra* note 123, at 44.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 51. The building blocks are defined as follows: “Centers: the local and regional destinations at the neighborhood, village, town, and urban scale. Districts: the special-use areas, which are necessarily dominated by a single primary activity. Preserves: the open-space elements that frame the region, protect farmlands, and preserve critical habitat. Corridors: the connecting elements based on either natural systems or infrastructure and transportation lines.”

<sup>129</sup> *Id.*



The inevitability of such unification is, however, not guaranteed. Designing and implementing a regional approach to land use controls implicates a labyrinth of public policies, such as transportation, natural environment, housing, tax equity, and education.<sup>130</sup> In addition, simply creating a bureaucracy does not ensure effective implementation, as each governing element of the region must be willing to actively participate.<sup>131</sup> One commentator has criticized the practicality of a regional plan, arguing that

because of the problems of interpreting, applying, and enforcing broad standards, . . . the regional legislature might succumb to the temptation to instead legislate by rules. . . . The grid-pattern may become the standard, rather than the cul-de-sac, but the opportunity to improve upon both grid-patterns and cul-de-sacs through the "laboratory" of multiple local governments will be lost.<sup>132</sup>

Furthermore, local municipalities, "stripped of land use powers," will inevitably invent new ways around the regional obstacles placed in their regulatory path.<sup>133</sup>

A main theme running through both Calthorpe and Fulton's optimism, and some of the very cogent criticisms maintained against regional planning, is an assumption of regulatory stasis throughout any proposed framework for change. The law of land use controls—and, presumably, the judicial and legislative functions through which it is created—is a rigid scheme that simply must be contended with—or avoided altogether. To a certain extent, this is an accurate portrait of the legal landscape. For example, most, if not all, developers do not actually wish to destroy the natural resources of open space corridors; they are

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<sup>130</sup> See generally, *Id.* at 61-87.

<sup>131</sup> *Id.* at 185.

<sup>132</sup> Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1114 (1996).

<sup>133</sup> *Id.*

instead “forced” into countryside development patterns through a combination of economic and legal forces. Specifically, there are two unforeseen economic factors which discredit such a free market, “hands-off” approach to land use.<sup>134</sup> First, because of the ability to rezone, the price of farmland is distorted by speculators betting that this otherwise inexpensive land will be re-zoned as residential or commercial—the windfall goes to the speculator, with the price differential paid for by the developer and home buyer.<sup>135</sup> Second, the difficulty and expense of infill development (redevelopment), caused primarily by current residents’ reluctance to allow, via the planning commission, further development, creates a milieu of risk and uncertainty.<sup>136</sup> It is therefore cheaper to pay the price of the speculator for undisturbed land and the attendant costs in infrastructure and services. The local public approval process, in effect, ratifies this behavior.<sup>137</sup>

But it is not clear whether local municipalities, after acknowledging the problem, could effect any meaningful change in this state of affairs.<sup>138</sup> The solution requires a reconceptualization in local planning, one which incorporates more input from the governmental bodies whose jurisdiction already encompasses a larger region. Instead of a static, provincial planning process, a credible regional perspective requires a dynamic interplay between various planning actors, both local and otherwise.<sup>139</sup> Zoning as a land use tool need not be discarded;

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<sup>134</sup> REGIONAL CITY, *supra* note 123, at 209.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> “It is the supreme irony of our current political system that we subsidize Greenfield development by giving away the value created by rezoning open space or farmlands while we create disincentives to infill with a public approval process that is arduous and risky.” *Id.* at 210.

<sup>138</sup> See, e.g., Burchell & Shad, *supra* note 93, at 158 (noting that any statewide initiative in the field of regional growth management will likely mandate only voluntary compliance for subunits of state government, or be non-punitive for non-compliance).

<sup>139</sup> Dynamism in the law and judicial process, of course, is an indispensable component of any functional legal system. See Aharon Barak, *A*

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rather, a new element of “regional” oversight must be injected into the development process. In addition to that of the municipality, county, state, and even national perspectives on land use patterns are needed to restore balance to urban, suburban, and exurban development patterns.

*C. The Landscapes of Chester County, Pennsylvania*

How can a viable, dynamic system of controls possibly be implemented? What method would determine the boundaries—and constraints—of the various layers of sovereignty such a plan would implicate? Is the increase in bureaucracy that would inevitably result really such a wise regulatory decision to make?<sup>140</sup> These questions and more have haunted most regional plans.<sup>141</sup>

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*Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 36 (2002) (discussing the need for judges to give statutes “a meaning compatible with social life in the present and . . . in the future. . . .”). See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>140</sup> For a discussion on the negative excesses of bureaucracies, see PAUL F. CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* 183 (1998) (criticizing the “ever-more complex analytic and rhetorical circles for choosing to do this rather than that. . . .”). See also PHILIP K. HOWARD, *THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TO FAR* (2001).

<sup>141</sup> Added to this dilemma is the general apathy among the voting public concerning the efficacy of long-range land use paradigms. See Martha T. Moore, *Walk-Can’t Walk: The Way Cities and Suburbs Are Developed Could Be Bad for Your Health*, USA TODAY, Apr. 23, 2003, at 1A, 2A (quoting member of Urban Land Institute: “Too many people just don’t care at all about design or sprawl.”). But cf. Haya El Nasser, *Makeovers Bring New Life to Old Malls*, USA TODAY, Apr. 23, 2003, at 3A (discussing grayfield recycling of old malls and quoting small business owner: “I can’t believe this was Dillard’s [department store]. For a creative business, it’s exactly where we should be. We’re surrounded by community.”); John Handley, *New Trends Taking Over Housing*, JOURNAL NEWS (Westchester County, N.Y.), Jan. 12, 2003, at 1G (“After sitting at a computer all day, people want human interaction and social life. Downtown residents live in [new developments] close to entertainment, the theater, bookstores, coffee shops. Many young urban dwellers are living alone, so the [neighborhoods] replace family.”).

Chester County, Pennsylvania, has tackled these problems in *Landscapes*,<sup>142</sup> the policy element of the county's comprehensive plan. The specifics of the land use program are set out in *Linking Landscapes: A Plan for the Protected Open Space Network in Chester County*,<sup>143</sup> an exhaustive work which aims to join "government, industry, and the general public . . . to establish a protected open space network" that will be "recognized as a form of public infrastructure, just like other networks that serve the common good, such as sewer lines, water service, and highways."<sup>144</sup> In order to implement this strategy, the plan establishes a multi-municipal vision for planning and protecting open spaces, and provides a blueprint for their restoration and maintenance in concert with ecological and recreational values.<sup>145</sup> Specifically, *Linking Landscapes* enumerates five planning policy goals: land use,<sup>146</sup> resources,<sup>147</sup> economic development,<sup>148</sup> transportation,<sup>149</sup> and community facilities.<sup>150</sup> With an eye towards

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<sup>142</sup> See LANDSCAPES, *supra* note 6.

<sup>143</sup> BOARD OF COUNTY COMMISSIONERS, COUNTY OF CHESTER, PENNSYLVANIA, *LINKING LANDSCAPES: A PLAN FOR THE PROTECTED OPEN SPACE NETWORK IN CHESTER COUNTY, PA* (2002) (hereinafter *LINKING LANDSCAPES*).

<sup>144</sup> *Id.* at iii.

<sup>145</sup> See generally *id.* at 1.7 *et seq.*

<sup>146</sup> "Preserve and enhance the diversified mix of urban, suburban[,] and rural land uses through municipal cooperation by concentrating development." *Id.* at 2.1. See also *id.* at 15.6-16 (discussing zoning, transferable development rights, and cluster development).

<sup>147</sup> "Sustain and enhance natural, scenic, and historic resources for the benefit of current and future generations while accommodating planned growth." *Id.* at 2.2. See also *id.* at 14.1-18 (proposing solutions for recycling rail and major utility corridors, scenic byways, and brownfields).

<sup>148</sup> "Achieve and maintain a healthy business climate to ensure continued, sound economic growth, and to preserve the quality of life. . . ." *Id.* See also *id.* at 15.20-21 (addressing downtown revitalization and vacant lot infill development).

<sup>149</sup> "Provide an intermodal transportation system which optimizes mobility, strengthens the economy, protects the environment[,] and is compatible with the [plan's] vision . . ." for the county. *Id.* See also *id.* at 16.3

each of these, open space protection and a corresponding responsible control of development will serve to enhance the quality of life, ecology, and economy of the county as a whole.<sup>151</sup> In short, the county's comprehensive plan has adopted the regional approach to land use planning.

From the planner's perspective, *Linking Landscapes* presents a workable framework for implementing "post-Euclidian" land development techniques on a broad scale. There remains, however, a major obstacle to putting this theory into practice: the legal system. Like most other states, Pennsylvania has adopted a standard version of the SSZEA, which focuses on zoning as a local, municipality-based prerogative.<sup>152</sup> As a result, any comprehensive vision of land use that looks beyond the town line is only hortatory.<sup>153</sup> Indeed, *Linking Landscapes* recognizes this state of affairs:

. . . it is the municipalities who have the ultimate authority when it comes to land use issues. . . . County government is charged with an advisory role, and is provided with the opportunity to make recommendations to municipalities, which the municipal officials may choose to incorporate into their . . . comprehensive planning if they so desire.<sup>154</sup>

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(examining Federal Highway Administration funding programs).

<sup>150</sup> "Provide accessible community facilities and services which meet the residents' needs through the cooperation of the public and private sectors." See generally *id.* at 12.1-100 (discussing regional recreation corridors).

<sup>151</sup> *Id.*

<sup>152</sup> See Pennsylvania Municipal Planning Code, 53 P.S. §§ 10101-11202 (2002).

<sup>153</sup> See *supra* note 7 (discussing advisory role of Pennsylvania counties in land use decision making).

<sup>154</sup> LINKING LANDSCAPES, *supra* note 143, at 1.47. Chester County has tied its municipal grant awards, however, to compliance with the comprehensive plan. *Id.*

Implementing the policies of open-space protection, conservation, and responsible development of the built environment in Chester County is, in effect, held back by a system of land use which, like nuisance before it, has been superseded by intervening social, economic, and environmental movements that were unknowable in the early twentieth century. *Linking Landscapes* was created by planners to work within this legal environment; unfortunately, it is the law itself that poses the greatest obstacle to effectuating the policy goals the planners have generated.

#### *D. Summary*

The planning community has recognized that development patterns in the United States have gone awry, and as a result have attacked the problem through a number of initiatives throughout academia and government. The legal system must now follow suit by rethinking the monopolistic role of the municipal comprehensive plan in zoning and development, and in its place structure a dynamic system of controls that encompasses a multitude of governmental subdivisions. This work concludes in the next section with a discussion of this subject.

#### V. CONCLUSION

From the Industrial Revolution onward, land use law has faced an evolving set of legal and practical challenges. With the ratification of the Constitution came the end of the colonial legislative decree, and the rise of the jurisprudential conventions attending the police power, embodied in the Supreme Court's decision in *Euclid*. Standing alongside this newly formulated land law rhetoric were the traditional principles of tort and contract, which, in the face of mass production and labor *en masse*, were forced to unfold in directions apart from their laconic pedigrees. By the last quarter of the century just past, many of the burning health, safety, and welfare ills of the cities had long since been

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erased, only to be replaced by the latent threat of sprawl to our nation's landscapes. Like the voracious, resource-intensive factories of the industrial United States, the appetite for inexpensive, unregulated expanses of land has grown to enormous proportions in the country's post-industrial phase. Accordingly, just as Euclidian bureaucracy developed in response to changed social and economic circumstances—which in turn called into question the existing common-law infrastructure—so too must the legal profession respond to zoning's inability to combat modern development patterns.<sup>155</sup> Both provide a tested and timeless framework within which society has operated well for centuries. Rather, I want to push the arguments of the planners into the legal realm, and provide a cogent reference point from which to effect meaningful modification of the *lex status quo*. As previously discussed, the legal system itself must take some responsibility for the state of land development we find ourselves in today. On the local level, zoning achieves its goals of separation of use, and provides an efficient mechanism for implementing the police power. When we look out the window, we see buildings that are built to sound specifications, dangerous operations that are far removed, and residential areas comprised mainly of residences. But these innocuous drops we experience belie the larger storm on the horizon: zoning as a whole discourages reinvestment in the built environment.

The solution is to incorporate the planners' ideas and focus on legal strategies for making land use law more dynamic, and less dependent on the local governmental subdivision. As we have seen, one county has already started down that path. But the cycle

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<sup>155</sup> Zoning and the local prerogative indeed play crucial roles in maintaining a regime that is inherently local. Therefore, any dynamic system of constraints must take into account the personal stage in which an evolving set of use norms arises. Moreover, it is not clear what, if any, benefits would be gained by completely erasing local planning roles. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2338 (2003) (arguing that merely enlarging existing municipal boundaries for purposes of combating sprawl will not provide a "political silver bullet").

cannot be complete until the states can wrest some degree of control from the municipalities. The SSZEA, written in a different time in response to different problems, must be revamped so as to integrate a more regional approach to land use planning. It is not necessary to envision a regional legislature in reaching this goal; county and statewide initiatives and regulations are within the reach of preexisting organizational structures. The key is not more bureaucracy, but rather increased coordination and accountability. Furthermore, it is not unrealistic to visualize a federal role. The federal government has already delineated a national environmental policy; the need for responsible development patterns also cuts across state lines. Given Congress's power of the purse, a genuine, concentrated push for a national policy could effect real change in the way States delegate their prerogatives under the police power.

Ultimately, lawyers and lawmakers have a broader responsibility than the planning profession: the former must ensure that the public policy of the community is implemented in a realistic, fair, and constitutional manner. The legal system, however, can benefit tremendously from the insights the planners bring to the table. Moving beyond zoning is the only way the legal profession can reinject the "planning" back into land use planning.



